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VIRGINIA LAW REGISTER

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Absence of Editor-in-Chief.

At the present writing our Editor-in-Chief is still sojourning in the Mother Country—or to be more exact, and not ignore those other countries that have given so generously of their populations to keep the "Melting Pot" boiling the Great Mother Land from whom, thanks to a kind Providence, we take our language and laws. As was noted on this page in the February number of the REGISTER, Judge Duke sailed for England on January 22nd. He had expected to return early in March but his stay has been prolonged a month beyond the expected time by the important legal business in which he has been engaged. While away he took advantage of being so near France to pay a visit to that country to see two of his sons who are in military service there: 1st Lieut. R. T. W. Duke, 3rd and 2nd Lieut. Wm. Eskridge Duke. The last-named was practicing law at the Charlottesville bar when he volunteered soon after our entry into the war. His remaining son, Lieut. John F. Slaughter Duke, is in the aviation service in this country.

Right of State to Appeal in Criminal Cases.

Attention is called to the case of Commonwealth *v.* Perrow published in full with note in this issue, in which Judge Kelly for the Supreme Court of Appeals very learnedly discusses the provision of the Virginia Constitution against double jeopardy, and reaches a conclusion consistent with the great weight of authority.

It is generally understood that it was the well-recognized doctrine of the ancient common law that no man could be twice put in jeopardy for the same offense. It is said that this rule may be

traced to a dictum of Lord Coke. It was regarded so vital to the maintenance of the Anglo-Saxon concept of individual liberty that it was made a part of the Constitution of the United States by the Fifth Amendment. In one form or another the doctrine has found expression in the Constitutions of a majority of the states of the Union. Under such constitutional provisions it has been consistently and uniformly held that any legislative attempt to confer upon the state the right of appeal for the correction of trial errors was futile.

As seen from the note ante, p. 923, in the absence of such constitutional provisions the courts of Connecticut and Vermont have held that statutes giving the state the right of appeal in criminal cases are valid. The Connecticut court advanced the theory that the jeopardy of the common law rule is single and continuous until a result free from error is reached. These courts were able to repudiate the old doctrine because they were bound by no constitutional provisions as to second jeopardy, but the reasonings of their decisions show that where there are such provisions, a broad and sensible construction of them would have the effect of making more difficult the unjust acquittal of law-breakers who should not go "scot free."

As said in a former issue of the REGISTER "a criminal trial should be an intelligent, conscientious investigation under the law, with every favor for life, and every reasonable doubt as to the facts, in favor of the prisoner. The law of the land guarantees to everyone accused of crime regardless of race or color, whether of high or low degree, whether rich or poor, a fair and impartial trial." 4 V. L. R., N. S., 241. One accused of crime is entitled to a fair trial under all the constitutional safeguards to protect him from an unjust conviction but on general principles of reason he is certainly not entitled to a trial in which erroneous rulings are made in his favor. And an acquittal brought about by erroneous rulings is a perversion of justice. It was pertinently remarked in the dissenting opinion in Kepner *v.* United States, 195 U. S. 100, 134:

> "At the present time in this country there is more danger that criminals will escape justice than that they will be subjected to tyranny."

The doctrine that no one should be put in jeopardy twice for the same offence should not be based on a theory that a person accused of crime has any natural right of exemption from those regulations of a judicial proceeding which the state deems necessary to make sure that the conduct and final result of that proceeding shall be in accordance with law. In State *v.* Lee, 65 Conn. 265, 30 Atl. 1110, the court very aptly said:

> "Owing to the confusion of principle with practice, a theory seems to have at times prevailed which assumes that the punishment of crime is a sort of invasion of natural right, and that a person accused of crime should be exempt from established rules of law binding on all other citizens, and therefore a procedure which proves incompetent to the correct application of legal principles in criminal trials can be changed, like any other rule of practice, when the change may tend to protect an accused from unjust punishment, but becomes a fundamental principle of jurisprudence, that can not be altered, when the change may tend to secure his just punishment. It needs no argument to dispel such an illusion, or to demonstrate that the natural rights of the individual, as well as the interests of public order, are best served, and the essential principles of jurisprudence are most accurately followed, when the proceedings in a criminal prosecution include such protection against injustice that the final disposition of the cause will not only settle the controversy, but settle it in accordance with law."

It seems perfectly logical to say that a person accused of crime would no more be put in jeopardy a second time when retried because of a mistake in his favor, than he would be when retried for a mistake that was injurious to him.

The Trial of the Ex-Kaiser.

William Hohenzollern, the arch criminal of the ages, is safely sojourning in the realm of Holland's Queen, while practically the whole world is unanimous in demanding that he be brought before the bar of international justice and tried for his many crimes and misdemeanors. Thousands of pages have been written as to what should be done with him, and a wide range of suggestions have been made reaching all the way from placing him

upon the island of St. Helena to exhibiting him in a cage before all the peoples of the world. But undoubtedly he should be tried and such punishment inflicted as to some world tribunal shall seem proper.

To the contention that the ruler of an empire is above the law it may be replied that the maxim "The King can do no wrong" has its foundation purely in national considerations, and does not apply to international affairs. As has been lately and violently proven, a king can commit wrongs on the people of other countries. And it is consistent with reason and justice that when such wrongs have been committed by the self-styled partner of "Gott" they ought to be punished, just as in the case of an ordinary criminal. Both the law of nations and natural justice are outraged when a large and powerful empire at the deliberate command of its imperial ruler invades a small nation without just cause, kills and mistreats its inhabitants, reduces them to a condition worse than that of slavery, robs and destroys their property, and desecrates their religious shrines. What Belgium has endured from the barbarian boches is well known. It is written upon the pages of the world's history in the blood of her heroes and the tears of her ravished women. The horrible and brutal crime committed by Germany on Belgium stands unparalleled in all times. Even Attila and his Huns of old can not compare with the modern Huns; the former did not pretend to be civilized or "kultured." Surely the civilized world can never condone such a colossal crime and surely no valid reason can be given why he who instigated it should not be brought to the bar of international justice. However, there are some who contend that the ex-Kaiser is freed from personal liability by the laws of war.

His great crime consists in precipitating the world war by his unwarranted violation of Belgian neutrality. According to Grotius self-defence, indemnity for loss occasioned, and punishment for wrongs suffered, are the only legitimate causes of war among civilized nations. Not a single one of these causes existed to justify the former German Emperor in ordering his armies to invade the territory of Belgium. The state of war he proclaimed following the unjust invasion was not war at all in a legal sense,

but a crime. The German Chancellor admitted that the invasion was wrongful but defended it by saying that necessity knows no law and that reparation would be made. All the world knows how Germany made reparation—in murder, rapine, and robbery. The German armies entered as criminals and their many deeds of murder, robbery and rape were crimes in the ordinary sense of the word and violative of the principles of the law of nations. Under the maxim "qui facit per alium facit per se," which is of universal application, the ex-Kaiser who instigated and by his orders carried out the crime against Belgium and humanity is legally responsible for all the terrible acts of his legions in that unhappy country. When these deeds of darkness were done he was the Supreme War Lord. The German Army owed allegiance to him alone. Every soldier was his personal agent. As to the responsibility of a Sovereign who wages an unjust war Vattel says:

> "It is the duty of subjects to suppose the orders of their sovereigns just and wise. When therefore they have lent their assistance in a war which is afterwards found to be unjust, the *Sovereign alone is guilty*. The subjects, and in particular the military, are innocent; they have acted only from a necessary obedience." (Le Droit des Gens, b. 3, ch. 11.)

Of the guilt of the former German Emperor there can be no doubt. All Belgium and northern France constitute real evidence of his many crimes. His orders to the U-boat commanders are well known. Among the mountains of positive proof that have arisen to condemn him there is a letter in his own hand written to the former Emperor of the former Austria-Hungary. Part of the letter, written soon after the world war started, is as follows:

> "My soul is torn asunder, but everything must be put to fire and blood. The throats of men and women, children and the aged must be cut, not a tree, not a house left standing. With such methods of terror, which alone can strike so degenerate a people as the French, the war will be finished before two months, while, if I use humanitarian methods, it may prolong for years. Despite all my repugnance, I have to choose the first system."

The crimes of the U-boats, the bombardment of defenceless towns and hospitals, the introduction of poisonous gas and liquid fire, the sinking of passenger and hospital ships, are all to be laid at the door of him who brought so much horror upon the world. Those which were not committed at his express command met his whole-hearted approval. An instance of this is his bestowal of a medal upon the commander of the piratical U-boat that sank the Lusitania.

William Hohenzollern is now in a place of asylum. Whether he can be extradited therefrom is a very important question, for you cannot cook your rabbit until you have caught it. It is believed that the ex-Kaiser is a proper subject of extradition. No less an authority than Grotius says:

> "The right of demanding the surrender or punishment of criminals that have fled into other kingdoms has, in most parts of Europe during the present and the immediately preceding centuries, been generally exercised in cases where the crimes were such as affected *the safety of the state or were attended with notorious atrocity.*"

The crimes of the Kaiser come within these classes. Grotius also says that the right of asylum is extended for the "protection only of those who are the victims of unmerited persecution, not for those who have committed crimes injurious to mankind and destructive to society." It is clear that the former German Kaiser is not the victim of an unmerited persecution, and it is equally clear that he has committed or instigated "crimes injurious to mankind and destructive to society."

The learned editor of *The Lawyer and Banker,* Charles E. George, takes issue with those members of Paris Law Faculty who contend that the late German Emperor may be extradited from Holland and tried in an International Court to be established, for crimes committed by his armies during the world conflict. He says in part:

> "A careful study of the law of nations, of the constitutional theory of citizenship and the rights of sovereigns, reveal no such rule of legal action favoring the views of these eminent French *savants*. First it must be considered that citizenship is in no sense contractual in its nature, but is in fact a relation *sui generis*. The theory of a criminal compact between

the sovereign and his people, holding that during the period of war the ruler may be properly charged as an accessory to the rapine or murder committed by his soldiers, is without the merit even of sociological argument. Under the principles of territorial jurisdiction, the safety of William Hohenzollern in Holland from extradition is assured under the law of today. The Law of Nations recognizes certain forms or attributes of legal legitimacy as applying to a resident alien. One is that the exile shall not be given up for a political crime. The diplomatic protection of the late Emperor is a duty incumbent on the part of Holland, as well as on the part of the United States; to see that there be no open violation of international law such as is proposed. The right of William Hohenzollern to protection is not a subjective one, it is rather the reflex of an objective one. It is not a favor or a gratuity. The late Emperor was at the head of a *de facto* government, exercising supreme authority, the nation over which he ruled is responsible for his each and every act, but he is not in any sense responsible for the act of the state or of individuals over which he exercised sovereignty. Bear in mind that authorization or ratification of the act of the individual, whether high or low has its own political reason so far as the state goes, releases that individual from liability and transfers it to the state. International law is but a usage or customs adopted as a compact between countries. If violated, no penalty can be enforced save by armed force. As a political matter the guilt of the ex-Kaiser can be determined by a commission, but as a judicial matter no court can be now created which could enforce its finding. Disregarding all questions of moral essence, confining the question purely to legal responsibility, no extraditable crime can be charged against the late Emperior. If he is not guilty under the civil or common law as it was written and recognized during the period of the war, then it must follow that no law can be now created by any nation or combination of nations or governments that can impose criminal responsibility upon him. Such act or acts would be *ex post facto* and void. Nor can a court be now created having jurisdiction of the subject matters arising out of that period August, 1914 to November 11, 1918, if there was no such tribunal having complete perfect and recognized jurisdiction during that period. The suggestion that an international tribunal can now be created having jurisdiction of acts committed in the past when such acts were not properly triable in any then existent court is against all reason and law. The Hague Arbitration Court which was

founded in 1899 could not dispose of the issue which it is attempted to raise. In that tribunal, no penalty is provided for. Will it be contended that the Hague Court could now be invested with penalties which it could apply to matters now coming before it, when the acts themselves furnishing the relative subject matter of cases submitted had to do with a period in the past when the penalties were non existent. Such action would be anti jurisdical. There must be a generally recognized penalty on the part of the state aggrieved for the commission of acts in order that punishment may follow."

It is believed that the views of our learned contemporary are erroneous. The following extract from an article by Mr. Otto Erickson in *Law Notes* is submitted as presenting a sound view of the right to extradite the ex-Kaiser:

"According to accepted definition extradition presupposes the concurrence of four elements: (1) the commission of a crime; (2) a person accused or convicted of such crime; (3) a state within whose territorial jurisdiction the crime was committed and which seeks to obtain possession of the criminal for the purpose of trying or punishing him; (4) a state having jurisdiction of the criminal and requested to surrender him. We have here all of these elements. The foundation is perfect. There is a diversity of opinion among the authorities on international law as to whether a state is bound by the law of nations and independent of treaty provisions to surrender fugitives. The difference between the two doctrines is that one considers extradition a matter of strict duty, while the other regards it as a matter of national comity. The distinction is important, for if it be a matter of strict duty a refusal to comply, on due demand, would afford ground for a declaration of war. But if it be conceded that there is no obligation to make such surrender independent of treaty, yet a nation is never bound to furnish asylum to dangerous criminals who are offenders against the human race. (Dip. Cor. 1864, part 2, p. 60.) Under the public law of ancient nations there was surrender if the crime was so heinous as to make it impossible to refuse to give up the offender to the just vengeance of the offended nation. (Lewis on Foreign Jurisdiction.) And Lammasch, the German publicist, upheld the doctrine that in the case of a heinous offense it is the duty of the state to surrender. In France it is held that the existence of a treaty does not limit the exercise of the right (Billot on Extradition, p. 119) and

in many cases criminals have been surrendered to the United States regardless of treaty by Great Britain, Sweden, Denmark, Austria, Mexico, Cuba and Brazil. The various treaties between The Netherlands and the belligerent powers cannot, within our present limits, be here examined. But should any or all of them contain provisions a strict construction of which would raise troublesome technical objections as to 'jurisdiction,' The Netherlands Government could immediately conclude new treaties with the demanding Powers. The principle that a treaty is not to be held to operate retroactively does not apply to conventions of extradition. (Moore on Extradition, sec. 86.) It is a general principle that such conventions apply to offenses committed prior to their conclusion (Twiss, Law of Nations), and that a fugitive has no vested right of asylum (*In re de Giacomo,* 12 Blatchf. 391) nor would the doctrine of *ex post facto* law apply (*ibid.*). Nor will it be necessary to ask the consent of the German Government. While to promote good relations the third state may be consulted, its refusal is not binding (Bomboy and Gilbrin on Extradition). The French Government does not consult the third state, the proceedings are carried out as if the accused were a citizen of the demanding country (Billot) and the United States has not admitted such provision in any of its treaties. In this view, it would follow that a refusal by Holland (or any neutral power in like circumstances) to surrender William Hohenzollern on due demand would justify the demanding nation in declaring war."

The treatment of Napoleon the First by the Congress of Vienna furnishes a precedent for the punishment of one who has proven himself to be the common enemy of nations. Talleyrand presented a resolution to the Congress that Napoleon Bonaparte had put himself without the pale of civil and social relations and that "as an enemy and disturber of the tranquility of the world he has rendered himself liable to public vengeance." It was determined that he should be imprisoned at a place to be determined by England. And St. Helena became famous because it was there *L'Empereur* spent his remaining days in exile. The would be Alexander, who built a palace in the Holy Land from which he intended to rule the world, should have at least as much punishment.

The Federal Reserve Act—Address of Secretary of Treasury.

The Federal Reserve Act passed by the 63rd Congress revolutionized the unfortunate currency system to which the progress and financial welfare of the country so long paid tribute. The old system fathered many panics and under it we have seen financial catastrophes come in the very midst of apparent business prosperity. Its most glaring defects were an utterly fictitious bank reserve and an inelastic bond-secured currency. The new system which withstood the shock of the greatest war of history will surely now endure whatever tests peace and reconstruction will bring, and do its full share in assisting this country to reach its well-deserved supremacy in the fields of the world's commerce and industry. This view is voiced by the father of the Reserve Act in a recent address before the Pittsburgh Chamber of Commerce. In comparing the two systems Secretary Glass said:

> "The whole startling contrast between the old system and the new may be summed up in the single statement that in 1907, under the old system, the failure of two banks in New York City precipitated the greatest financial panic that ever afflicted the nation, whereas, under the new system the greatest war of recorded history failed to create a ripple of alarm in the banking community of the United States! In the panic of 1907 New York could not let a country bank have $50,000 of currency to meet the ordinary requirements of trade. In 1915 New York loaned two European nations $500,000,000 for the prosecution of war! Before the advent of the Federal Reserve banks the financial system of the country, in times of exigency, could not minister to ordinary domestic needs. Today, besides taking care of these, the United States has brought back from foreign nations in excess of $3,000,000,000 of American securities, has loaned foreign nations $11,000,000,000 for purposes of war, has floated on Government account $18,000,000,000 of Liberty Bonds and War Savings Certificates, not to mention the billions of dollars of treasury certificates of indebtedness issued in anticipation of the Liberty Loans."

The Victory Liberty Loan.

Four Liberty Loans have gone "over the top" and the Fifth or "Victory Loan" should be just as successful. Though the war, in a sense, is over and we have not the martial spirit to give us inspiration as it did in the former Loan Drives, we should not let our patriotism be lulled into a sleep of unconcern because peace has almost come. Every true American should be just as patriotic in time of peace as when war walks abroad in the land. It is just as necessary now for the Government to raise funds to pay for the cost of its gigantic and seemingly impossible achievements as it was when America was doing those things which has made her the wonder of the world for all time. To put one's money into the interest-bearing obligations of the greatest government in the world is surely a safe and sane investment. But we should not only view the loan strictly from an investment standpoint but also consider it as a matter of patriotic pride. Nearly sixty thousand Americans rest in immortal sleep in the bosom of France, and we should do honor to these heroes and pay homage to their glorious service by cheerfully performing the imperative duty of doing our full share to make the Victory Loan an abundant success. The Secretary of the Treasury, in the address above referred to, in paying an admirable tribute to America's great achievements and refuting the contentions of those cold-hearted ones who say that the success of the Victory Loan will be impossible said:

> "When the intolerable maritime atrocities of a barbarous autocracy drove this nation into a war for the preservation of civilization, it was said to be impossible to organize an American army that would be effective in the struggle then deluging Europe in blood. Yet we know, and the fugitive William Hohenzollern knows, that we did organize an army, which speedily helped to drive the mad monarch into exile, and to insure the peace of the world. And when the army was organized, it was said to be impossible to transport it across the seas in time to be a deciding or helpful factor. I sat in the halls of Congress and heard a distinguished and discerning statesman, with cruel bitterness, deride the American Minister of War for a suggestion that, within an appointed time, we would transport to France an army of 500,000 men. It was asking us to 'live in a fool's paradise,' it was 'giving

play to wild and unstable imagination,' it was 'misleading the American people into a belief in impossibilities.' Yet within the designated time 750,000 American soldiers were landed at the ports of our allies.

"Then it was said that these untested troops could not be trained in time for effective combat. Yet it was a unit of American army engineers, brigaded with the British before Cambria, who threw down their implements and picked up the castaway rifles of their British comrades, with which they impeded the desperate attempt of veteran Prussian divisions to retrieve the fortune of battle. It was the 'impossible' American army that arrested the German drive at Chateau Thierry, first halting the Huns and then driving them back. The sorely pressed, but brave and heroic French, shaken by four years of frightful struggle, were in desperate retreat. They told American officers that to go forward was impossible, and besought them to turn back. A few weeks ago in France I was personally told of the laconic answer of the American commander to this appeal. 'Go back!' he exclaimed. 'Why, hell, we've just got here; and my orders are to go forward!' And they went forward; and, as President Wilson in his address to Congress so pointedly said, 'From that moment it was back, back, ever back for Germany.' She never thereafter wrested a single foot of soil from the allied armies.

"For four fateful years, nearly, the dangerous salient of St. Mihiel projected its threatening head into France, menacing Verdun from the flank. The Germans could not be driven back, it was said, without frightful slaughter of the allied force. Those familiar with the topography said it was impossible. Yet, that untried American army made the assault and drove the Prussians helter-skelter under the defensive guns of Metz. The operation was over in fourteen hours, with 15,000 German prisoners in the American prison pens.

"So impossibilities are constantly made possible; and when I am told of the difficulties which will beset the Victory Loan I refuse to lose faith in the enduring patriotism of the American people; I decline to believe that the fathers and mothers who gave four million sons to die, if need be, that liberty might survive, will now higgle over the material cost of saving the very soul of civilization from the perdition of Prussian tyranny."

Virginia's great son aptly calls this last Liberty Loan a "Thanksgiving Loan;" and truly it should be for this nation has so much

to be thankful for. We have emerged from the World War with imperishable glory and undying honor. In a material sense we are well off. Nowhere in our land does hunger stalk to claim its victims. The whole width of the continent is free from devastated fields and cities ruined by the modern Huns. We have been saved the horrors of profaned homes, defiled women and mutilated children. Not a one of our many churches have been destroyed.

Secretary Glass closed his admirable address in the following words:

> "Men in this great exigency of war have been transformed. We think today of the Transfiguration as if it were altogether and finally supernatural . . . but it is my belief that in every great trial of humanity the Transfiguration is ever present, and that men and women with spirit to sacrifice and with courage to conquer, mount to its highest peaks, and bring heaven down upon earth. It is my belief that Edith Cavell among women, and Albert among kings, and Mercier among churchmen, and Burgomaster Max among the lesser councillers, have their type in every nation of this earth; have their type among the humble and private citizens of this land . . . . While the best among us may presently witness in our own minds and hearts a singular contest between avarice and that better element of human nature which makes us willing to believe that man was created in the image of God, the right eventually will prevail. We are not going to approach the last Liberty Loan strictly in a commercial spirit . . . We have got to appeal to the patriotism of the American people, and it will not be done in vain . . . The Government is still expending two billion dollars per month to meet the honorable commitments of the country. The honor of the Government is involved. Being your Government, it is your honor that is involved; and I know that the appeal of the American Government to the American people will meet a response of which the nation will be proud."